UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

NANCY L. NELSON, as Personal Representative of the Estate of Robert I. Nelson II, GARRY NELSON and DEBORAH NELSON,	)	
Plaintiffs	)	
v.	)	Civil No. 02-193-B-S
CGU INSURANCE COMPANY OF CANADA,	)	
Defendant	)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiffs have filed suit to recover insurance proceeds allegedly owed under a policy of insurance issued to the decedent, Robert I. Nelson II, and delivered to Nelson while he was living in Canada. In addition to their claims of contract breach, Plaintiffs seek additional remedies in counts asserting violations of the Maine Insurance Code. Defendant CGU Insurance Company of Canada ("CGU") now moves for judgment on the pleadings on the ground that the policy contains a mandatory and enforceable forum selection clause and, therefore, this Court is per se a forum non conveniens. CGU also argues that those counts premised on the Maine Insurance Code are not actionable because the Code does not apply to the subject Canadian policy. I **RECOMMEND** that the Court **GRANT** the Motion in its entirety and dismiss the case without prejudice.

Facts

The following facts are drawn from the allegations in the Plaintiffs' Amended Complaint, which are deemed true, as well as from the policy of insurance attached thereto. Rivera-Gomez v. de Castro, 843 F.2d 631, 635 (1st Cir. 1988); Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co., 228 F.3d 24, 32 (1st Cir. 2000) (indicating that a court "may properly consider the relevant entirety of a document integral to or explicitly relied upon in the complaint . . . without converting the motion into one for summary judgment"). On January 29, 2002, Robert I. Nelson II ("Robert Nelson"), was driving his Honda Accord sedan in Presque Isle. (Amended Complaint, ¶ 11.) Riding with him was his brother, Plaintiff Garry Nelson. (Id., ¶ 12.) Robert Nelson suffered fatal injuries and Garry Nelson serious bodily injuries and emotional distress when an uninsured tractor trailer driven by an uninsured motorist collided with Robert Nelson's vehicle. (Id., ¶¶ 12, 13.) In addition to these injuries Garry's wife, Plaintiff Deborah Nelson, has suffered a loss of consortium. (Id., ¶ 28.) At the time of the accident, Robert Nelson was insured under a policy of insurance issued by CGU. (Id., ¶¶ 10, 11.) The policy provides $1 million in coverage and extends coverage to injuries caused by uninsured motorists. (Id., ¶ 10; Exhibit A, § D.) CGU issued the subject policy for delivery to Robert Nelson at his Halifax, Nova Scotia post office box. (Id., Exhibit A.) At the time of Robert Nelson's death, he was a citizen and domiciliary of the United States and the State of Maine, but was temporarily residing in Nova Scotia. (Id., ¶¶ 3, 4.)

The Plaintiffs (hereinafter referred to as "the Nelsons") have brought suit against the driver of the tractor trailer in a separate forum. (Id., ¶ 15.) In the course of that

proceeding, they have "definitively ascertained" that the driver of the tractor trailer has no liability insurance. (Id.) There is no indication whether the tractor trailer was insured. The Nelsons have duly provided written notice to CGU of their claims against the uninsured tractor trailer driver and have made a written demand for the policy limits. (Id., ¶ 16.) The Nelsons nowhere assert in their Complaint that the driver of the tractor trailer was negligent, although it would be a logical inference for the Court to indulge.[1] CGU failed to respond in any manner to the Nelsons' efforts to resolve their claims short of litigation. (Id., ¶ 17.)

The Nelsons' claims for uninsured motorist proceeds are governed by the following provision found in subsection 5 of Section D of the policy, which pertains to "Uninsured and Unidentified Automobile Coverage":

> Issues as to whether or not a claimant is legally entitled to recover damages and as to the amount of such damages shall be determined
>
> (a) by written agreement between the claimant and the insurer,
>
> (b) at the request of the claimant and with the consent of the insurer, by arbitration . . ., or
>
> (c) subject to [an inapplicable qualification], by The Supreme Court of Nova Scotia, in an action brought against the insurer by the claimant.

(Id., Exhibit A, § D(5) & Exhibit B, § 5(a).)

Discussion

CGU's Motion is styled as a "motion for judgment on the pleadings" pursuant to Rule 12(c). In Silva v. Encyclopedia Britannica, Inc., 239 F.3d 385 (1st Cir. 2001), the First Circuit Court of Appeals indicated that "a motion to dismiss based upon a forum-selection clause is treated as one alleging the failure to state a claim for which relief can

[1] Given their joinder with the Estate as plaintiffs, Garry and Deborah Nelson apparently do not claim that their injuries were caused by the negligence of Robert Nelson.

be granted," and that such a defense may be pursued in the context of a motion for judgment on the pleadings pursuant to Rule 12(h)(2). Id. at 387 n.3. Of course, where forum non conveniens is asserted, the proper remedy is a judgment of dismissal without prejudice, not the entry of judgment against the plaintiffs' claims. Id. at 386, 388 n.6 (affirming dismissal without prejudice).

I. The forum-selection clause is mandatory and should be enforced.

Forum selection clauses "are prima facie valid," The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972), and should be enforced unless they are the product of fraud or overreaching or unless enforcement would be unreasonable or unfair or would contravene a strong public policy of the forum. [2] LFC Lessors v. Pacific Sewer Maint. Corp., 739 F.2d 4, 6 n.1 (1st Cir. 1984). The forum selection clause contained in CGU's policy states unequivocally that litigation over coverage "shall" be determined in the Supreme Court of Nova Scotia. This is mandatory language. Compare Silva, 239 F.3d at 389 ("[T]he word 'must' expresses the parties' intention to make the courts of Illinois the exclusive forum for disputes arising under the contract. . . . We therefore conclude that the forum-selection clause is mandatory."). Thus, the clause will be enforced "unless 'enforcement would be unreasonable and unjust, or . . . the clause [is] invalid for such reasons as fraud or overreaching.'" Id. (quoting The Bremen, 407 U.S. at 15).

[2] The Law Court has not developed a contrary forum-selection doctrine nor has the Maine Legislature adopted a specific statutory directive on this issue. Had it, this Court would be required to consider whether the enforcement of a forum-selection clause is a procedural or substantive matter for purposes of the Erie doctrine in order to determine whether the federal or state approach should govern. Under this circumstance, where there is no strongly articulated state forum-selection doctrine, it is entirely appropriate for the Court to follow the federal standard. Lambert v. Kysar, 983 F.2d 1110, 1116 (1st Cir. 1993) (bypassing the issue where state and federal law were not in conflict); Silva, 239 F.3d at 386 n.1 (same). The principal case relied upon by the Nelsons, Ins. Prod. Marketing, Inc. v. Indianapolis Life Ins. Co., 176 F. Supp. 2d 544 (S.C. 2001), involved a situation where the United States District Court for the District of South Carolina concluded that both the South Carolina Supreme Court and the Legislature had evinced a strong public policy contra enforcement of forum selection clauses. In the face of that strong public policy, even though the court applied federal common law pursuant to the principles of the Erie doctrine, the court held the forum selection clause unenforceable.

There is no evidence in this case of fraud or overreaching. See Carnival Cruise Line v. Shute, 499 U.S. 585, 595 (1991) (enforcing Florida forum-selection boilerplate printed on a cruise ticket against Washington residents who embarked on cruise in California); Silva, 239 F.3d at 389 (holding that boilerplate and non-negotiated contract provisions are not to be deemed invalid "ipso facto"). Nor have the Nelsons presented any evidence to overcome the "'heavy burden of proof,' required to set aside the clause on grounds of inconvenience." Shute, 499 U.S. at 595 (quoting The Bremen, 407 U.S. at 17, and rejecting Ninth Circuit's conclusory finding, not supported by the record below, of "physical and financial impediments" to the plaintiffs' ability to pursue their claims in Florida). Nor would the Nelsons succeed based on Garry and Deborah's status as non-signatories to the insurance contract because federal courts enforce forum-selection clauses equally against contract beneficiaries and signatories. See, e.g., E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 195 (3d Cir. 2001) ("[W]hether seeking to avoid or compel arbitration, a third party beneficiary has been bound by contract terms where its claim arises out of the underlying contract to which it was an intended third party beneficiary."); Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190 (3d Cir.), cert. denied, 464 U.S. 938 (1983) (applying forum-selection clause to related tort claims as well as to contract claims of third party beneficiary); TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc., 915 F.2d 1351, 1354 (9th Cir. 1990) (holding that "a forum selection clause can restrict a third-party beneficiary to the designated forum"); cf. Acciai Speciali Terni USA, Inc. v. M/V Berane, 181 F. Supp. 2d 458, 464-65 (D. Md. 2002) ("[A] third-party beneficiary is bound by the terms and conditions of the contract it invokes. The beneficiary 'cannot

accept the benefits and avoid the burdens or limitations' of the contract.") (applying maritime law).

Thus, the sole avenue remaining to the Nelsons is to assert that a clear public policy of the State of Maine would be undermined if the forum-selection clause is enforced. The Nelsons make this argument in reliance, primarily, on the following provisions in the Maine Insurance Code:

> (1) "No conditions, stipulations or agreements in a contract of insurance shall deprive the courts of this State of jurisdiction of actions against foreign insurers . . . ." 24-A M.R.S.A. § 2433; and
>
> (2) "Any person having a claim against any foreign insurer may bring a trustee action or any other appropriate action therefor in the courts of this State." Id., § 2434 (captioned "Suits against foreign insurers").

According to the Nelsons, these provisions evince a "clear legislative intent to eviscerate the effect of forum selection clauses in insurance policies." (Plaintiffs' Opp. at 3.) The Nelsons also argue that Maine's strong public policy is reflected in its long-arm statute, its uninsured motorist laws and its constitutional guarantee of the right to trial by jury. (Plaintiffs' Opp. at 4.)

Unfortunately for the Nelsons, sections 2433 and 2434 do not apply to policies—such as Robert Nelson's policy—that are issued for delivery outside of Maine. Section 2401 of the Maine Insurance Code states as follows:

> § 2401 **Scope of chapter**
>
> This chapter applies to all insurance contracts and annuity contracts, other than:
>
> 1. Reinsurance
> 2. Unless otherwise specifically indicated, policies or contracts not issued for delivery in this State nor delivered in this State; and
> 3. Wet marine and transportation insurance.

(emphasis added.) Therefore, even if the Court were to conclude that §§ 2333 and 2334 are meant to negate forum-selection clauses, they are not applicable to the Nelsons' circumstance. Whatever public policy is reflected in these provisions, it is a policy addressed only to rights created in insurance policies issued for delivery in Maine.[3] Id. I also do not consider the Nelsons' invocation of the long-arm statute to be of assistance to them. Although the Legislature has extended the jurisdictional reach of Maine courts as far as the federal Constitution will allow in order to provide "its citizens with an effective means of redress against nonresident persons who . . . incur obligations to citizens entitled to the state's protection," 14 M.R.S.A. § 704-A, the decision to do so in no way reflects a legislative policy that such rights cannot be waived or modified by contract. Likewise, nothing in Maine's uninsured motorist laws reflects a strong public policy against enforcement of forum-selection clauses in contracts of insurance issued for delivery outside of this State. Finally, and similarly, the mere existence of a constitutional right to trial by jury is not reflective of a significant state policy that would be undone by enforcement of a forum selection clause. Because I find each of the Nelsons' arguments unpersuasive, I **RECOMMEND** that the Court **DISMISS** Counts I through III without prejudice.

[3] There is nothing in the language of either Section 2333 or 2334 that specifically indicates those provisions are intended to reach foreign insurers which have neither issued for delivery nor delivered policies or contracts in this State, let alone "alien insurers" (See 24-A M.R.S.A. § 6 and Complaint, ¶ 3) transacting business in a foreign country. The Nelsons try to suggest that there is some sort of factual dispute about CGU's knowledge vis-à-vis Robert Nelson's "ties to Maine." (Pl.'s Opp. at 11). However, for purposes of this discussion, the salient point is that the policy was issued and delivered in Nova Scotia, Canada (Ex. A).

II. The statutory claims are not actionable because the statutory provisions on which they rely are inapplicable to the subject policy.

In Count IV the Nelsons allege that CGU has violated a duty to either dispute or pay the Nelsons' claims within 30 days, pursuant to 24-A M.R.S.A. § 2436(1). In Count V they allege that CGU has engaged in unfair trade practices based on this and other alleged violations, pursuant to 24-A M.R.S.A. § 2436-A. Like Sections 2433 and 2434, these provisions do not apply to the subject policy. 24-A M.R.S.A. § 2401. I therefore **RECOMMEND** that the Court also **DISMISS** Counts IV and V.

Conclusion

For the foregoing reasons, I **RECOMMEND** that the Court **GRANT** Defendant's Motion for Judgment on the Pleadings.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

April 10, 2003

Margaret J. Kravchuk
United States Magistrate Judge

STANDARD

U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 1:02-cv-00193-GZS
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NELSON, et al v. CGU INSURANCE CO
Assigned to: Judge GEORGE Z. SINGAL
Referred to:
Demand: $0
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 28:1332 Diversity-Insurance Contract

Date Filed: 12/16/02
Jury Demand: Plaintiff
Nature of Suit: 110 Insurance
Jurisdiction: Diversity

Plaintiff

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DEBORAH NELSON	represented by	**WILLIAM D. ROBITZEK** (See above for address) *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

V.

Defendant

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